No. 6010

United States
Circuit Court of Appeals

For the Ninth Circuit

TERRITORY OF ALASKA,

Appellant,

vs.

FIRST NATIONAL BANK OF FAIRBANKS,
a corporation,

Appellee.

APPELLEE'S BRIEF

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division

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The statement of the case contained in appellant's brief is substantially correct, except such statement does not refer to the affirmative answer of appellee which alleges the non-joinder of parties defendant in that neither Charles Clinton Rice, his heirs, executors,

administrators or assigns are joined as parties defendant (Tr. 8). Appellee contends that the judgment of the trial court should be affirmed for the following reasons:

I.

The appellant failed to prove the death of Charles Clinton Rice, the owner of the property sought to be escheated to the Territory of Alaska, and there is no evidence in the record that diligent effort had been made to ascertain the whereabouts of said Rice.

II.

The evidence fails to show that Rice died intestate and without heirs.

III.

Rice, his heirs, executors, administrators, assigns, devisees and legatees should have been joined as parties defendant.

ARGUMENT

I.

Referring to appellee's first contention, we submit the evidence fails to show the death of Rice, and also fails to show facts sufficient to raise a presumption of his death. It is true if a person leaves his place of residence and is absent for a period of seven years or

more, and is not heard from by his relatives or neighbors during that period, and that a diligent inquiry has been made of those who would most likely hear from him or know of his whereabouts, and such person cannot be located after such inquiry, then a presumption arises that he is dead. There is no evidence of diligent search for Rice, nor is there any evidence of diligent inquiry of those who would be most likely to know anything about his whereabouts.

George B. Wesch, assistant cashier and trust officer of the defendant bank, was the only witness who testified in the case (Tr. 12, 13, and 14). He testified that he worked in defendant bank from 1914 to 1920 and was absent from the bank from 1920 to 1925; that he didn't know Rice; and didn't know whether Rice was known by other officers of the bank. No other officer was called as a witness. No proof was offered as to whether Rice left any address with the bank. He testified that the second deposit of War Savings Stamps and Liberty Loan Bonds were left with the defendant bank by Rice on the 3rd day of June, 1919. Wesch further testified that he made inquiries at the postoffice, but failed to state the extent or character of such inquiries, and did not state what responses were elicited by such inquiries (Tr. 13). He also testified that he inquired at the Probate Court if Rice had died or if there was any record of

his death (Tr. 13). But he didn't state at what probate court he made such inquiry. Rice may have received mail from the postoffice at Fairbanks and may have left a forwarding address with the postoffice. Wesch further testified, "I do not know anything about Rice personally; I do not know where he worked or lived. I do not know what his occupation was, nor do I know whether he had any relatives in the Territory, nor do I know whether he was a permanent resident of the Territory or just a transient" (Tr. 14). There is no evidence in the record as to whether Rice was a resident of Fairbanks or a transient. If proper inquiries had been made at the United States postoffice at Fairbanks, the present address of Rice might have been discovered. If Rice and his heirs had been made parties to this proceeding and a summons delivered to the United States Marshal for the Fourth Division of the Territory of Alaska, that officer might have located Rice or might have ascertained his whereabouts or the whereabouts of his heirs, if he were dead at that time. We submit there is no evidence that any diligence was exerted in an effort to locate Rice.

In *Modern Woodmen of America v. Gerdon*, 82 Pac. 1100, at 1102, the court said:

"In order that the presumption of life may be overcome by the presumption of death, there must be evi-

dence, not merely of absence from home or place of residence for the period of seven years, but there must be a lack of information concerning the absentee on the part of those likely to hear from him after diligent inquiry. Greenleaf makes the following statement of the rule: 'Among the circumstances material to this issue are the age of the party, his situation, habits, employment, state of health, physical constitution, the place or climate of the country whither he went and whether he went by sea or land, the facilities of communication between that country and his former home, his habits of correspondence with his relatives, the terms of intercourse on which he lived with them; in short, any circumstances tending to aid the jury in finding the fact of life or death. There must also be evidence of diligent inquiry at the place of the person's last residence in this country, and among his relatives and any others who probably would have heard of him, if living, and also at the place of his fixed foreign residence if he was known to have had any.' 2 Greenleaf on Evidence, Sec. 278."

In *Hitz v. Algreen*, 48 N. E. 1068, at 1069, the court said:

"In order to enforce the presumption of death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of residence and among his relatives and any others who probably would have heard from him if living. Hancock v. Insurance Co., 62 Mo. 26; 2 Greenl. Ev. (15th Ed.) § 278 f; Wentworth v. Wentworth, 71 Me. 72; Bailey v. Bailey, 36 Mich. 182; Whiting v. Nicoll, 46 Ill. 233. Long absence alone, no matter how long continued, is not sufficient of itself to raise a presumption of death. There must be shown an absence of seven years or more from the established residence

of the party before the presumption of death can be raised."

Wright v. Jones, 135 N. W. 1120.

In *New York Life Ins. Co. v. Holck*, 151 Pac. 916, at 918, the court said:

"It is true that in none of these cases was the sufficiency of the complaint raised or passed upon, but in each of them it seems to be assumed that the averments of fact which made it appear that death will be presumed is sufficient to state a cause of action, when based upon such presumption. This necessarily follows, because in such cases actual death cannot be alleged and in these circumstances there is no other method by which the pleader can allege the death of the insured than by apt averments of facts from which it will appear his death is presumed."

Olson v. Modern Woodmen of America, 164 N. W. 46.

Marquet v. Aetna Life Ins. Co., 159 S. W. 733:

"It is necessary that the person as to whose death it is sought to raise a presumption shall have been absent from his home or the place where he has established a residence. Thus where a person has changed his residence from one state or country to another, the fact that he has not been heard of in the place of his former residence for seven years raises no presumption of his death, at least in the absence of evidence that inquiries have been made for him at his last known place of residence without success; and the mere absence of a person from a place where his relatives reside, but which is not his own place of residence, and the fact that his relatives have not received letters from him for seven years, does not raise any presumption of his death."

13 Cyc. 300.

In *re Fuller v. New York Life Ins. Co.*, 199 Fed. 897, at 898 and 899, the court said:

"What weight is to be given to all the circumstances that attend a particular absence? And, as the final result of the inquiry, should death be inferred? Many circumstances may need consideration; but they must all be submitted to a jury when that tribunal is the trier of the facts. Cases that disclose a chancellor's opinion concerning the weight of the explanatory evidence only show us how he reasoned upon the evidence that was then before him. They do not furnish a rule that is obligatory upon a jury, or upon another chancellor, in reasoning upon different, or even upon somewhat similar evidence. He who relies upon an unexplained absence during seven years must prove it, and he must prove more than the mere fact of absence during that period. He must also produce evidence to justify the inference that death is the probable reason why nothing is known about the missing person. In the ordinary trial at law, a jury must draw the inferences, both intermediate and final; and it will rarely, if ever, be the case, that the facts concerning one absence will so closely resemble the facts concerning another that inferences drawn in the first inquiry will furnish a binding rule for the second. If a dispute exists about any of the facts, the jury must first determine it and they are then to draw from the facts thus ascertained whatever inference may be proper. Even if the facts are undisputed, it is the jury that must draw the inferences, saving perhaps, in exceptional cases."

Solomon v. Redona, 198 Pac. 643, at 645.

The appellant seems to rely on *Hamilton v. Brown*, 161 U. S. 256, 16 S. Ct. Rep. 585. But in that case, both parties assumed and relied upon the death of the former owner of the property in controversy.

"The general rule is that no presumption of death of a person arises from the mere fact of his unexplained absence unless diligent efforts have been made to find him, although an exception to the general rule has been made in the case of an aged person who has been absent and unheard of for a long period of time. The diligence required under the rule means that degree of diligence which the definition of the word implies and requires that inquiry be made among friends and relatives of the missing person; that it be made at his last known place of residence and at the place where he was last known to be alive, at least where the relations between him and his family are not shown to be such as would reasonably be supposed to induce him to correspond with them if alive, or where the person was known to have a fixed place of residence abroad. The inquiry should extend to all places where information is likely to be obtained and to all those persons who, in the ordinary course of events, would be likely to receive tidings if the person were alive; the inquiry must be such as exhausts all sources of information which the circumstances suggest; and in some instances the courts have declined to presume the death of an absentee from whom nothing had been heard for twenty-five years who had not been advertised for."

17 C. J., Sec. 11, p. 1171.

21 C. J., Sec. 27, p. 858.

II.

Passing now to appellee's second contention why the judgment of the trial court should be affirmed, the evidence fails to show that Rice died intestate and without heirs.

"The burden is on the plaintiff to prove an escheat and its right to the property under the statute defin-

ing those to whom escheated property is payable. The law presumes that a decedent leaves heirs or next of kin, capable of inheriting, and it is incumbent upon the state to rebut this presumption by proof of high degree."

21 C. J., Sec. 25, p. 857.

In 10 R. C. L. Sec. 11, p. 613, the author says, among other things:

"In making out its title, the state is confronted with the presumption of law that a person has next of kin; and this is one of the strongest presumptions known to the law, because the presumption itself runs with the usual current of nature. It is so conclusive that it can only be overcome by positive proof of the want of persons capable of taking the estate under the laws of descent and distribution. To rebut it, proof of the fact of there being no known heirs may raise a presumption of the failure of the inheritable blood; but such proof must be direct and positive, shown to be founded upon inquiry, advertisement, personal family knowledge or the declarations of those from whom the property descended."

Ann. Cases, 1913 E., p. 381 and note 383 and 384.

Ann. Cases, 1915 C., p. 1058 and note 1061 and 1062.

U. S. Fidelity & Guaranty Co. v. Dempster, 133 Atl. 723.

N. Y. Central & H. R. R. Co. v. Cottle, 168 N. Y. S. 465.

In *re State v. Williams*, 54 So. 951 at 952, the court said:

"Before the state can succeed, it was incumbent upon it to make all the inquiries, investigations and advertisements. In Sec. 2186 of Elliott on Evidence will be found the best statement of the rule on the subject of the legal presumption of heirs. It is that the 'presumption of law is that a person dying intestate has left heirs capable of succeeding to his estate. This presumption that the estate of such person is transmitted to others by the law of descent is so strong that *it can only be overcome by positive proof of the want of persons capable of taking the estate* under the laws of descent and distribution. * * * The presumption was held to be so conclusive that it was not overcome by proof of the fact that neighbors and acquaintances of an intestate who had known him for many years, did not know that there were, in fact, persons capable of taking his estate under law.' Again the same authority says that 'It is held that proof of the fact of there being no known heirs might raise a presumption of the failure of the inheritable blood; but such proof should be *direct and positive*, shown to be founded upon inquiry, advertisement, personal family knowledge or the declarations of those from whom the property descended."

21 C. J., Sec. 25, p. 857.

21 C. J., Sec. 27, p. 858.

Rucker v. Jackson, 60 So. 139.

Modern Woodmen of America v. Ghromley, 139 Pac. 306.

III.

Referring to the third reason assigned why the judgment of the trial court should be affirmed, appellee contends that Rice, his heirs, executors, administrators, assigns, devisees and legatees should

have been made parties defendants. There is no evidence in the record of the death of Rice. Appellant should have made him a party defendant; in fact, the appellant should have alleged the facts from which a presumption of death would arise. Since appellant was in possession of no positive proof of the death of Rice, it could not positively allege his death.

In *re N. Y. Life Ins. Co. v. Holck*, 151 Pac. 916 at 918 *supra*, the court said:

"This necessarily follows because in such cases actual death cannot be alleged and in these circumstances there is no other method by which the pleader can allege the death of the insured than by apt averments of facts from which it will appear his death is presumed."

If Rice, his heirs, executors, administrators and representatives had been made parties defendant, and the order to show cause had contained the same title as the complaint and summons, there is more likelihood that Rice or those interested in his estate, if he were dead, would have observed the published order.

Section 4 of an act entitled, "An Act Providing for the Escheat of Certain Estates to the Territory of Alaska and Providing for their Disposal and Repealing Former Laws on that Subject, and Declaring

an Emergency," Session Laws of Alaska, 1921, Chapt. 40, pages 125 and 126, provides:

"Whenever the Attorney General shall be informed or shall have reason to believe that any real or personal property has escheated to the Territory and no administrator has been appointed for such estate, the Attorney General shall, on behalf of the Territory, file an information in the District Court, setting forth a description of the estate, the name of the person last seized, the name of the occupant or person in possession of the estate or any part thereof, if known, and of the person, if any such be known, claiming the estate or any part thereof and the facts and circumstances in consequence of which the estate is claimed to have been escheated, with an allegation that by reason thereof, the Territory has become the owner and entitled to the possession of the estate. Upon such information, a summons must issue to such person or persons, requiring him or them to appear and answer the information within the time allowed by law in civil actions, and the court must make an order setting forth briefly the contents of the information and requiring all persons interested in the estate, to appear and show cause, if any they have, within such time as the court making such order may fix, why the title should not vest in the Territory, which order must be published for at least six consecutive weeks from the date thereof in a newspaper published in the precinct if one be published therein, and in case no newspaper is published in the precinct, then in a newspaper published in the Division in which the escheated property is located, as the court by order may direct."

We submit the owner of the property sought to be escheated should have been made a party defendant in the absence of positive proof of his death and if ap-

ellant were in possession of positive proof of the leath of the owner, his heirs and representatives, whether known or unknown, should have been made parties. The defendant in this action is a mere custodian of the property sought to be escheated. The present proceeding is brought for the purpose of ascertaining whether or not the owner of the property is dead, and if dead, did he die intestate and without heirs? The owner of the property, if alive, and his heirs or others interested in his estate, if he is dead, are the real parties in interest, and should have been made parties defendant. The section of the statute last quoted provides: "Upon such information a summons must issue to such person or persons requiring him or them to appear and answer the information within the time allowed by law in civil actions."

What person or persons does the statute contemplate must be summoned to appear? Evidently those interested in the title and ownership of the property sought to be escheated to the Territory.

This construction of the section of the statute last quoted is supported by the language of Section 5 of the same Act of the Alaska Legislature which provides: "The court, upon information being filed and upon the application of the Attorney General, either before or after answer, after notice to the parties claiming such estate, if known, may, upon sufficient

cause therefor being shown, appoint a receiver to take charge of such estate and receive the rents and profits of the same until the title to such estate is finally settled."

In this case the person claiming the estate was known to appellant. Appellant contends such claimant or owner is dead but whether he is living or dead was one of the material issues to be determined by the action and his death cannot be assumed by the appellant but must be proved. He therefore should have been made a party to the action and an attempt made to serve him personally. The process server might have located him or might have ascertained his last known place of address or the address of his heirs or others interested in his whereabouts.

"Generally when property is taken under an escheat act, some form of notice to the owner is required to make the proceedings due process of law; and ordinarily the statutes require that a notice or citation shall issue to all persons interested in the estate, to appear and answer. Such statutes must be substantially complied with; notice is essential to the jurisdiction of the court; and the record of the proceedings must show that the notice required by statute was given."

21 C. J., Sec. 19, p. 856.

In *re State v. Security Savings Bank*, 199 Pac. 791, the court, at page 793 said:

"It cannot be doubted that the state is not the holder of the legal title of the depositor. That title

has not been transferred to the state by any act of the depositor and the state cannot, by a mere statutory declaration, take away the right of the depositor and appropriate to its own use his property therein. Const. Art. 1, Sec. 13. The depositor is therefore a necessary party to any action by the state to enforce the payment of the money due on deposit into the state treasury, and the bank has the right to insist that the depositors be brought into the case as parties by some process or notice that the law recognizes as valid. It therefore has the right to contend that the process and notice prescribed by these statutes do not constitute due process of law."

Wallahan v. Ingersoll, 7 N. E. 519.

Commonwealth v. Dollar Savings Bank, 102 Atl. 569.

In this case no notice whatever was served or attempted to be served on the owner of the property sought to be escheated. The information alleges his death and appellant seems to have assumed that no notice to him or his heirs was necessary in order to give the court jurisdiction to escheat the property described in the complaint.

Section 4 of the Act of the Territory, *supra*, provides "Upon such information a summons must issue to such person or persons requiring him or them to appear and answer the information within the time allowed by law in civil actions," etc.

Whom does that language of the statute refer to? The appellant evidently contends it merely refers to

the custodian but the owner of the property is the interested party. At the time of the commencement of the action he was certainly presumed to be alive. His death must be established by the appellant. As to whether he is dead or alive is a question of fact, and that fact could not be determined until all of the evidence was submitted to the court, and if the owner were alive, obviously he should be given an opportunity to prove that fact, and therefore the appellant should have advised him by notice of the attempt that was being made to escheat his property to the Territory on account of the fact that appellant contended he was dead. We contend the procedure followed in this case does not constitute due process of law and that the owner of the property sought to be escheated, if living, and if dead, his heirs, did not have their day in court.

We respectfully submit the judgment of the trial court should be affirmed.

Respectfully submitted,

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